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FILED

JUN 18 1973

IN THE

SUPREME COURT OF THE UNITED STATES

No. 72-1710

THE WASHINGTON THEATER CLUB, INC.,

Petitioner,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF FINANCE AND REVENUE, PROPERTY ASSESSMENT DIVISION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

RICHARD J. HIRSCH

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DISTRICT OF COLUMBIA DEPARTMENT O
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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Petitioner, The Washington Theater Club, Inc., re
fully prays that a writ of certiorari issue to revie
judgment and opinion of the District of Columbia
of Appeals entered in the above-entitled case on Ja
4, 1973, and March 20, 1973, respectively.

OPINION BELOW

The only opinion filed by the District of Columbia Court of Appeals was on denial of petitioner's petition for rehearing. That opinion, reprinted in Appendix A to this Petition,[1] is reported at 302 A.2d 231 (D.C. App. 1973).

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on January 4, 1973, and is reprinted in Appendix B to this Petition. A timely petition for rehearing, or, alternatively, for rehearing *en banc* (App. I), was filed on January 18, 1973, and was denied by the Court of Appeals on March 20, 1973. A copy of the order denying rehearing is reprinted in Appendix C to this Petition, and a copy of the order denying rehearing *en banc* is reprinted in Appendix D. The jurisdiction of this Court is asserted under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether a party, in an appellate proceeding before the highest court of a state or Federal jurisdiction is denied its federal constitutional right to procedural due process when the court, in deciding that it lacks jurisdiction, bases its decision on an entirely unexpected legal theory, never argued by, and wholly outside the contemplation of, the parties, and makes that decision at the end of the proceedings when the aggrieved party no longer has the opportunity to present legal

[1] All references to Appendices in this Petition will be to "App." followed by the letter designation and page or paragraph number when necessary.

arguments, whether oral or written, in opposition to the position taken by the appellate court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

* * * * *

The provisions of the District of Columbia Administrative Procedure Act, D.C. Code §§ 1-1501 to 1-1510 (Supp. V. 1972) are set forth in pertinent part as follows:

"§ 1-1502. Definition.

* * * * *

"(8) the term 'contested case' means a proceeding before . . . any agency in which the legal rights, duties, or privileges of specific parties are required by any law (other than this chapter), or by constitutional right, to be determined after a hearing . . . before an agency, but shall not include (A) any matter subject to a subsequent trial of the law and the facts de novo in any court; . . .

* * * * *

"(11) the term 'order' means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) . . . of any agency in any matter other than rule-making, but including licensing; ·

"(12) the term 'license' includes the whole or part of any permit; . . . statutory exemption, or other form of permission granted by . . . any agency;

"(13) the term 'licensing' includes process respecting the grant, renewal, denial, . . . or conditioning of a license by . . . an agency . . . .

* * * * *

"§ 1-1508. Declaratory orders.

"On petition of any interested person, . . . an agency, within [its] discretion, may issue a declaratory order with respect to the applicability of any rule or statute enforceable . . . by it, to terminate a controversy (other than a contested case) or to remove uncertainty. A declaratory order, as provided in this section, shall be binding between . . . the agency . . . and the petitioner on the state of facts alleged and established, unless such order is altered or set aside by a court. A declaratory order is subject to review in the manner provided in this chapter for the review of orders and decisions in contested cases . . . .

* * * * *

"§ 1-1510. Judicial review.

"Any person suffering a legal wrong, or adversely affected or aggrieved, by an order or decision of . . . an agency in a contested case, is entitled to a judicial review thereof in accordance with this chapter upon filing in the District of Columbia Court of Appeals a written petition for review . . . ."

* * * * *

D.C. Code §11-1201 (Supp. V. 1972) provides in pertinent part as follows:

> "The Tax Division of the Superior Court shall be assigned exclusive jurisdiction of–
>
> "(1) all appeals from and petitions for review of assessments of tax (and civil penalties thereon) made by the District of Columbia . . . ."

* * * * *

D.C. Code §11-1202 (Supp. V. 1972) provides in pertinent part as follows:

> "Notwithstanding any other provision of law, the jurisdiction of the Tax Division of the Superior Court to review the validity and amount of all assessments of tax made by the District of Columbia is exclusive . . . ."

* * * * *

D.C. Code §47-1208 (1967 ed.) provides in pertinent part as follows:

> "The following personal property shall be exempt from taxation.
>
> "First. The personal property of all library, benevolent, charitable, and scientific institutions incorporated under the laws of the United States or the laws of the District of Columbia and not conducted for private gain."

* * * * *

D.C. Code §47-2403 (Supp. V. 1972) provides in pertinent part as follows:

> "Any person aggrieved by any assessment by the District of any personal-property . . . tax . . . may within six months after payment of the tax together with penalties and interest assessed thereon, appeal

from the assessment to the Superior Court of the District of Columbia . . . ."

* * * * *

STATEMENT OF THE CASE

A. The Raising of the Federal Question

Following respondent's denial of petitioner's application for an exemption from the District of Columbia personal property tax, petitioner filed a petition for review in the District of Columbia Court of Appeals (App. F). Respondent filed a motion to dismiss the petition for want of jurisdiction (App. G), which the court granted without opinion (App. B). Following petitioner's filing of a petition for rehearing (App. I), the court denied the petition, and unexpectedly handed down a "surprise" opinion in which it denied that it had jurisdiction to review the denial of petitioner's tax exemption on a legal basis never argued by, or within the contemplation of, the parties at a time when petitioner no longer had the opportunity to present legal argument in opposition to the position taken by the court since petitioner was legally precluded from filing a second petition for rehearing (*see* Rule 40, R.D.C. App.).

It was at that moment, then, that petitioner claims it was denied procedural due process under the Fifth Amendment, and therefore it was at that moment that the federal question arose. As a consequence, petitioner was obviously precluded from properly raising the federal question in the Court of Appeals and is therefore raising the question for the first time before this Court in the present petition for a writ of certiorari.

Petitioner recognizes that, under ordinary circumstances, it is too late to raise the federal question for the

first time in a petition for certiorari since that document is not part of the record of the lower court proceedings. Petitioner comes, however, within the rare exception to the rule, as established in *Saunders v. Shaw*, 244 U.S. 317, 320 (1917), in which "the highest state court, following a 'surprise' decision wherein the federal issue is born, declines to entertain a petition for rehearing and the federal question can be raised in no other way than through the papers addressed to the Supreme Court." Stern & Gressman, *Supreme Court Practice* 126 (4th ed. 1969). The parallel between *Saunders* and the present case may be seen in the following analysis of the proceedings below, the arguments presented by the parties, and the court's "surprise" opinion accompanying the order denying rehearing.

B. The Proceedings Before the Department of Finance and Revenue

1. *Petitioner's Application for Tax Exemption.* In June 1972, petitioner, The Washington Theater Club, Inc., applied to respondent, the District of Columbia Department of Finance and Revenue, for an exemption from payment of personal property taxes, pursuant to Section 47-1208 of the D.C. Code (1967 ed.). The basis for its application was that it was a benevolent, charitable and scientific institution incorporated under the laws of the District of Columbia and not conducted for private gain within the meaning of the exemption statute (App. F. ¶¶1, 2, at 1f). In support of its request, petitioner submitted various financial documents as well as a statement describing the character of its organization (*see* App. G, at 1g).

2. *Respondent's Denial of the Exemption.* Without hearing, respondent advised petitioner in a letter dated

September 25, 1972 (App. E), that it did "not qualify for exemption under Section 47-1208 of the District of Columbia Code." Respondent gave no reasons for its determination. In an informal conversation, however, officials of respondent's Property Assessment Division informed petitioner's counsel that the denial of the personal property tax exemption was based on petitioner's failure to prevail in a suit in the Superior Court of the District of Columbia, contesting the denial of its *real property* tax exemption under Section 47-801(a)(j) of the D.C. Code (1967 ed.), which case is now pending on appeal in *Washington Theater Club, Inc. v. District of Columbia,* No. 6953, App. D.C. (App. F, ¶4, at 1f; App. I, at 5i-6i).

C. The Proceedings in the District of Columbia Court of Appeals

1. *The Petition for Review.* In October 1972, petitioner filed a petition for review of respondent's ruling in the District of Columbia Court of Appeals (App. F). Petitioner complained that respondent had failed to give reasons for its ruling (*see* App. F, ¶¶5, 6, at 1f-2f) and that respondent, in effect, had failed to make a determination as to petitioner's exempt status in conformity with the provisions of the District of Columbia Administrative Procedure Act, D.C. Code §1-1501 et seq. (Supp. V. 1972) (*see* App. G., at 2g). Petitioner further complained that, if in fact respondent had denied the personal property tax exemption on the basis of the denial of petitioner's real property tax exemption, then respondent had abused its discretionary powers because the statutory standards for the personal property tax exemption were completely different from the statutory standards for the real property tax exemption (App. F, ¶7, at 2f; *see* App. I, at 6i).

2. *Respondent's Motion to Dismiss.* Respondent thereupon filed a motion to dismiss (App. G). Respondent argued that, under Section 1-1510 of the D.C. Administrative Procedure Act, the Court of Appeals was empowered to review only a decision in a "contested case," as that term is defined by Section 1-1502(8)(A) of the Act. Under that provision, "any matter subject to a subsequent trial of the law and the facts de novo in any court" was excluded from the definition of "contested case" (App. G, at 2g). Since, under Section 47-2403 of the D.C. Code (Supp. V. 1972), petitioner had the right, after payment of the personal property tax, to bring suit in the Superior Court of the District of Columbia, it was precluded under Section 1-1502(8) to seek review in the Court of Appeals (App. G, at 2g).

3. *Petitioner's Memorandum in Opposition.* In its memorandum in opposition to the motion to dismiss (App. H), petitioner argued that respondent was under a misapprehension of the scope of the D.C. Administrative Procedure Act. Under the Act, judicial review was provided not only for orders in contested cases, as respondent had contended, but for declaratory orders as well (App. H, at 1h-2h). Petitioner explained that respondent's September 25, 1972, letter ruling was (App. H, at 2h)–

> "nothing but a declaratory order of petitioner's exempt status under Section 47-1208. As such, the order, in accordance with Section 1-1508 [of the Administrative Procedure Act], 'is subject to review in the manner provided . . . for review of orders and decisions in contested cases,' as that procedure for review is set forth in Section 1-1510 of the Act."

4. *The Lower Court's Dismissal of the Petition for Review.* Without permitting oral argument, two judges of

a three-judge panel of the appeals court granted respondent's motion to dismiss the petition for review on January 4, 1973 (App. B).[2] No opinion accompanied the judgment.

5. *The Petition for Rehearing.* Petitioner then petitioned for a rehearing, or, in the alternative, for a rehearing *en banc* (App. I). As the basis for its petition, petitioner argued against the only grounds upon which it believed the two judges of the lower court could have relied. As petitioner defined the situation (App. I, at 1i):

> "[E]ither (1) the Judges believed that the government's denial of a personal property tax exemption was not a 'declaratory order,' within the meaning of Section 1-1508 . . ., and therefore not subject to review in accordance with Section 1-1510 . . ., or (2) they believed that review was not required because, in accordance with Section 1-1502(8)(A) . . ., the matter involved was 'subject to a subsequent trial of the law and facts de novo' in the Superior Court under the provisions of Section 47-2403 . . . . Neither reason is valid."

With respect to the first ground, petitioner argued (App. I, at 2i-3i) that, under the Administrative Procedure Act, a " 'license' includes the whole or part of any . . . *statutory exemption* . . . granted by . . . any agency" (§1-1502(12), emphasis added), " 'licensing' includes [the] process respecting the grant . . . [or] *denial . . . of a license* by . . . an agency" (§1-1502(13), emphasis added), and " 'order' means the whole or any part of the *final disposition* (*whether* affirmative, negative, injunctive or *declaratory in form*) . . . of any agency in any matter . . . including *licensing*" (§1-1502(11), emphasis added).

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[2]Chief Judge Reilly did not participate in the decision (*see* App. B).

Thus, respondent's denial of petitioner's personal property tax exemption had to be a declaratory order. As such, it was subject to judicial review since, under Section 1-1510 of the Administrative Procedure Act, "[a]ny person suffering a legal wrong, or adversely affected or aggrieved, by an order or decision of . . . an agency in a *contested case*, is entitled to a judicial review thereof . . ." (emphasis added), and, under Section 1-1508, "[a] declaratory order is *subject to review in the manner provided* . . . for the review of orders and decisions in *contested cases* . . ." (emphasis added).

With respect to the second ground, petitioner pointed out (App. I, at 3i) that the limitation in Section 1-1502(8)(A) on the definition of "contested case" excluding "any matter subject to a subsequent trial" was not a condition on the court's review power under Section 1-1510 and not a limitation on the definition of "declaratory order" under Section 1-1508. "Thus, even if the declaratory order here were subject to subsequent trial de novo in the Superior Court, it would not be excluded from review under Section 1-1510" (App. I, at 3i). Petitioner further showed (App. I, at 3i-4i) that its position was bolstered by the legislative history of the Administrative Procedure Act, indicating a congressional purpose to provide a uniform means of reviewing agency determinations. H.R. Rep. No. 202, 90th Cong., 1st Sess. 3 (1967); S. Rep. No. 1581, 90th Cong., 2d Sess. 5, 6 (1968); *see Cheek v. Washington*, 333 F. Supp. 481 (D.D.C. 1971). Petitioner finally argued that the refund suit in Superior Court, provided for in Section 47-2403, could not preclude review in the Court of Apepals since, under *Lindner v. District of Columbia*, 32 A.2d 540 (D.C. Mun. App. 1943), "when a remedy is provided that requires payment of a tax before an appeal may be taken, that remedy is not meant to be the exclusive remedy" (App. I, at 4i).

6. *The Court's Denial of the Petition for Rehearing.* Almost two months passed before the Court of Appeals acted. On March 20, 1973, the full three-judge panel denied the petition for rehearing (App. C), and the full court denied the petition for a rehearing *en banc* (App. D). For the first time in the proceeding, the three-judge panel filed with its order an opinion finally setting forth its reasons not only for denying the petition for rehearing, but also for denying the petition for review (App. A).

In its opinion, the panel all but conceded petitioner's arguments that Section 1-1508 "is not limited to 'contested' cases as defined in . . . §1-1502(8)" and that the *Lindner* case "decided that there can be more than one mode of review available to petitioner" (App. A, at 2a). "Nevertheless" the court denied the petition for rehearing on a theory never previously presented to the court by respondent and never previously argued against by petitioner. "[W]e hold," said the court, "pursuant to D.C. Code 1967, §11-1201 (Supp. V, 1972) and D.C. Code 1967, §11-1202 (Supp. V, 1972) that the exclusive remedy lies in the Tax Division of the Superior Court" (App. A, at 2a). The court quoted Section 11-1201 as assigning to the Tax Division of the Superior Court "exclusive jurisdiction of . . . all appeals from and petitions for review of assessments of tax . . . made by the District of Columbia" (App. A, at 2a n.2), and Section 11-1202 as granting exclusive jurisdiction to the Tax Division of the Superior Court "to review *the validity* and amount of all assessments of tax made by the District of Columbia" "*/n/otwithstanding any other provision of law*" (App. A, at 2a n.3). The court then concluded (App. A, at 2a, emphasis added):

> "*Whatever may be said for a completely literal reading of the Administrative Procedure Act*, the foregoing sections [§§11-1201 and 11-1202]

specifically granting that [tax] division exclusive jurisdiction to review such tax cases must be deemed a superseding limitation on the *breadth of the language of* § *1-1508*."

By virtue of the court's invoking a new legal theory precluding judicial review in its opinion accompanying the denial of the petition for rehearing, petitioner was barred from presenting any argument in opposition to the theory since Rule 40 of the court's rules does not permit the filing of more than one petition for rehearing in the same proceeding.[3]

REASONS FOR GRANTING THE WRIT

THE APPELLATE COURT'S ACTION RAISES A SUBSTANTIAL AND HERETOFORE UNSETTLED FEDERAL QUESTION AS TO THE SCOPE OF PROCEDURAL DUE PROCESS UNDER THE FIFTH AMENDMENT AND CONFLICTS IN PRINCIPLE WITH TWO DECISIONS OF THIS COURT.

In denying its own jurisdiction on an unexpected legal theory never argued by the parties and with respect to which petitioner no longer had the opportunity to present legal arguments in opposition, the District of

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[3]Had it been able to do so, petitioner would have argued that, although Sections 11-1201 and 11-1202 confer on the Tax Division of the Superior Court "exclusive jurisdiction" to review all cases involving "the validity and amount of all assessments of tax," these provisions do not confer jurisdiction on that court to review cases involving a declaratory order denying a statutory exemption. It is not lightly to be presumed, therefore, that these provisions act as "a superseding limitation on the breadth of the language of §1-1508," especially in light of the literal language of Section 1-1508, the congressional history of the Administrative Procedure Act, and the principle established in *Lindner v. District of Columbia*, 32 A.2d 540 (D.C. Mun. App. 1943).

Columbia Court of Appeals raised a substantial federal question as to the scope of procedural due process under the Fifth Amendment, which this Court has heretofore not expressly settled. The lower court's action, however, does bring it into a fundamental conflict in principle with this Court's rulings in *Saunders v. Shaw*, 244 U.S. 317 (1917), and *FCC v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265 (1949).

A. *Saunders v. Shaw*

In *Saunders*, the ruling of the trial court, which had previously been affirmed by the Louisiana Supreme Court, was unexpectedly reversed by the State Supreme Court on rehearing. The aggrieved party filed a second petition for rehearing which the Louisiana high court declined to entertain "under its rule that only one rehearing should be granted" (244 U.S. at 319). The party then brought a writ of error to this Court alleging that "he has been deprived of due process of law contrary to the Fourteenth Amendment, because the case has been decided against him without his ever having had the proper opportunity to present his evidence" (*id.*), which had only become relevant on the basis of the State Supreme Court decision. This Court reversed. In addressing the questions whether the writ of error could be maintained and the constitutional right vindicated, Mr. Justice Holmes, speaking for the Court, established the following rule (*id.* at 320):

> "[W]hen the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way

could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or to take other precautions in advance."

Here, just as in *Saunders*, the highest court in the jurisdiction came down with an unexpected ruling on a petition for rehearing. Petitioner was also barred by the court's rules from filing a second petition for rehearing. Similar to the aggrieved party in *Saunders*, so here does petitioner claim that it has been denied its federal constitutional right to procedural due process. In *Saunders*, of course, the complaint was leveled at the "act of the [State] Supreme Court, done unexpectedly at the end of the proceeding when the plaintiff in error no longer had *any right to add to the record*" (244 U.S. at 320), whereas here the complaint relates to the act of the highest court of the District of Columbia, done unexpectedly at the end of the proceeding when petitioner no longer had *any right to present legal argument* in opposition to the court's position. This distinction between *Saunders* and the present case, however, should not make a difference as far as the constitutional principle is concerned. This is so especially in view of this Court's subsequent ruling in *FCC v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265 (1949).

B. *FCC v. WJR*

In the *WJR* case, the United States Court of Appeals for the District of Columbia Circuit had held that, with certain minor exceptions, procedural due process required oral argument "on every question of law raised before a judicial or quasi-judicial tribunal." *WJR v. FCC*, 174 F.2d 226, 233 (D.C. Cir. 1948). This Court

articulated the issue presented before it as follows (337 U.S. at 267):

> "Most broadly stated the important question presented by this case is the extent to which due process of law, as guaranteed by the Fifth Amendment, requires federal administrative tribunals to accord the right of oral argument to one claiming to be adversely affected by their action, more particularly upon questions of law."

Relying in part "on the opportunity given the radio station to submit its argument to the Commission in writing" (*The Supreme Court–1948 Term*, 63 Harv. L. Rev. 119, 153 (1949); *see* 337 U.S. at 284), the Court reversed the court of appeals, holding that "the right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances, as do other procedural regulations" (337 U.S. at 276). Citing *Londoner v. Denver*, 210 U.S. 373 (1908), the Court acknowledged that it had "held in some situations that such [oral] argument is essential to a fair hearing" (337 U.S. at 275).[4] The Court further noted, however, that, in other situations, it had held "that argument submitted in writing is sufficient" (*id.* at 275-76), citing the first *Morgan* case–*Morgan v. United States*, 298 U.S. 468 (1936).[5]

Although the Court's narrow ruling was confined to a rejection of the lower court's proposition that procedural due process required oral argument on every question of

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[4] In *Londoner*, the Court had stated that "a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal" (210 U.S. at 386).

[5] In *Morgan*, the Court had noted that "argument may be oral or written" (298 U.S. at 481).

law raised before federal administrative tribunals, the scope of its ruling clearly is operative with respect to judicial tribunals as well. Moreover, by its citation to both *Londoner* and the first *Morgan* case, this Court's holding makes clear, if only by implication, that, under the due process clause of the Fifth Amendment, a party must be accorded an opportunity either for oral argument, or at the least for argument presented by written submission on questions of law.[6] *See* Recent Case, 63 Harv. L. Rev. 883, 884 (1950) ("[T]he Supreme Court has held written argument sufficient"); *cf. Gonzales v. United States*, 364 U.S. 59, 62, 71-72 (1960) (written rather than oral rebuttal on issue of credibility sufficient in case involving a selective service restraint). This

[6] This is the precise analysis and interpretation of the *WJR* case by the Minnesota Supreme Court in *Railroad & Warehouse Comm'n v. Chicago & N.W. Ry.*, 256 Minn. 227, 98 N.W.2d 60, 66 (1959) ("in order to satisfy procedural due process requirements there must be . . . the right to argument, either oral or written"). With the exception of the Fifth Circuit in *Sun Oil Co. v. FPC*, 256 F.2d 233, 240-41, *cert. denied*, 358 U.S. 872 (1958), this principle has been followed uniformly by the federal courts of appeal. *See, e.g., American Broadcasting Co. v. FCC*, 179 F.2d 437, 442 (D.C. Cir. 1949); *Urbano v. Calissi*, 353 F.2d 197, 198 (3d Cir. 1965); *Brown v. Strickler*, 422 F.2d 1000, 1002 (6th Cir. 1970); *Dodd v. Spokane County, Wash.*, 393 F.2d 330 (9th Cir. 1968); *NLRB v. Allied Dist. Corp.*, 297 F.2d 679 (10th Cir. 1961). As stated in *Dodd*: "The court acted upon the complaint without notice to plaintiff of the proposed action, and without affording him an opportunity to *at least submit a written argument in opposition thereto*" (393 F.2d at 334, emphasis added)). *See also Moore v. California Mineral Prods. Co.*, 115 Cal. App.2d 834, 252 P.2d 1005, 1007 (1953): "In our research we have not discovered another case in which judgment was rendered upon a point of law raised by the court with no warning of counsel and no opportunity given to ward off the blow. Elementary principles of due process support our conclusion that if . . . the court, sua sponte, unearths

Court, however, has never explicitly decided the issue presented here. Certiorari is therefore necessary to resolve the question.

Just as the Court in *Saunders* (244 U.S. at 320) and in *WJR* (337 U.S. at 267) considered the issues presented there as important and of major constitutional dimension, so here the issue presented, involving as it does an extension of the principles established in the *Saunders* and *WJR* cases, is also important and of major constitutional dimension, requiring review by this Court.

CONCLUSION

For the foregoing reasons, petitioner requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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Attorneys for Petitioner

Dated: June 18, 1973

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a point of law which it deems to be decisive of the cause, the party against whom the decision impends has the same right to be heard before the decision is announced that he has to produce evidence upon the issues of fact." *See generally* K. Davis, *Administrative Law Treatise* §7.07, at 330-31 (Supp. 1970).

APPENDIX A

OPINION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 6837

THE WASHINGTON THEATER CLUB, INC., PETITIONER,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF FINANCE AND REVENUE, PROPERTY ASSESSMENT DIVISION, RESPONDENT.

On Petition for Rehearing

Decided March 20, 1973

Charles T. Duncan and *Richard J. Medalie* for petitioner.

C. Francis Murphy, Corporation Counsel, and *Kenneth R. West* and *Henry E. Wixon*, Assistant Corporation Counsel for respondent.

Before REILLY, Chief Judge, FICKLING and NEBEKER, Associate Judges, in chambers.

PER CURIAM: Upon denial of exemption as an institution under D.C. Code 1967, § 47-1208 and assessment of taxes due by the District of Columbia Department of Finance and Revenue, Property Assessment Division, petitioner sought review in this court under the District of Columbia Administrative Procedure Act.[1] The Dis-

[1] D.C. Code 1967, §§ 1-1501 *et seq.* (Supp V, 1972). *See also* D.C. Code 1967, § 11-722 (Supp. V, 1972).

trict of Columbia moved to dismiss for lack of jurisdiction, which we granted. On petition for rehearing, petitioner argues that *Lindner v. District of Columbia*, D.C.Mun.App., 32 A.2d 540 (1943), decided that there can be more than one mode of review available to petitioner, and that D.C. Code 1967, § 1-1508 (Supp. V, 1972), is not limited to "contested" cases as defined in D.C. Code 1967, § 1-1502(8) (Supp. V, 1972). Nevertheless, we hold pursuant to D.C. Code 1967, § 11-1201 (Supp. V, 1972) [2] and D.C. Code 1967, § 11-1202 (Supp. V, 1972) [3] that the exclusive remedy lies in the Tax Division of the Superior Court. Whatever may be said for a completely literal reading of the Administrative Procedure Act, the foregoing sections specifically granting that division exclusive jurisdiction to review such tax cases must be deemed a superseding limitation on the breadth of the language of § 1-1508.[4]

Accordingly, the petition for rehearing is

Denied.

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[2] § 11-1201. Exclusive jurisdiction

The Tax Division of the Superior Court shall be assigned exclusive jurisdiction of—

(1) all appeals from and petitions for review of assessments of tax (and civil penalties thereon) made by the District of Columbia . . . .

[3] § 11-1202. Abolition of other remedies

Notwithstanding any other provision of law, the jurisdiction of the Tax Division of the Superior Court to review *the validity* and amount of all assessments of tax made by the District of Columbia is exclusive. . . . (Emphasis added.)

[4] *See* note 1, *supra*.

APPENDIX B

JUDGMENT OF THE DISTRICT OF COLUMBIA COURT OF APPEALS

[Filed: January 4, 1973]

No. 6837 January Term, 1973

THE WASHINGTON THEATER CLUB, INC.,
Petitioner,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF FINANCE AND REVENUE, PROPERTY ASSESSMENT DIVISION,
Respondent.

BEFORE: Reilly, Chief Judge, Fickling and Nebeker, Associate Judges.

ORDER

On consideration of respondent's motion to dismiss the petition for review filed herein, and of petitioner's opposition thereto, it is

ORDERED that respondent's aforesaid motion be granted and this cause is hereby dismissed.

PER CURIAM.

Chief Judge Reilly did not participate in the foregoing order.

APPENDIX C

ORDER DENYING REHEARING BY THE DISTRICT OF COLUMBIA COURT OF APPEALS

[Caption Omitted in Printing]

[Filed: March 20, 1973]

On Petition for Rehearing

BEFORE: Reilly, Chief Judge, Fickling and Nebeker, Associate Judges.

ORDER

On consideration of petitioner's petition for rehearing, it is

ORDERED that the aforesaid petition is denied for the reasons set forth in the opinion filed herein this date.

Per Curiam.

Dated: March 20, 1973

Opinion *per curiam.*

APPENDIX D

ORDER DENYING REHEARING *EN BANC* BY THE DISTRICT OF COLUMBIA COURT OF APPEALS

[Caption Omitted in Printing]

[Filed: March 20, 1973]

BEFORE: Reilly, Chief Judge, and Kelly, Fickling, Kern, Gallagher, Nebeker, Pair, Yeagley and Harris, Associate Judges.

ORDER

On consideration of petitioner's petition for rehearing *en banc*, it is

ORDERED that petitioner's aforesaid petition is denied.

BY THE COURT:

GERARD D. REILLY,
Chief Judge.

Dated: Mar. 20, 1973

APPENDIX E

DECLARATORY RULING DENYING TAX EXEMPTION BY THE GOVERNMENT OF THE DISTRICT OF COLUMBIA

DEPARTMENT OF FINANCE AND REVENUE

September 25, 1972

Washington Theater Club, Inc.
1101 23rd Street, N.W.
Washington, D.C. 20037

Gentlemen:

The data submitted for consideration in your request for personal property tax exemption has been carefully considered by committee.

In their opinion, your organization does not qualify for exemption under Section 47-1208 of the District of Columbia Code.

One of the enclosed return forms for the current fiscal year should be completed and filed with this office within twenty days.

Sincerely,

/s/ Thomas R. Kenny
Thomas R. Kenny
Chief Auditor

APPENDIX F

PETITION FOR REVIEW OF ORDER

[Caption Omitted in Printing]

[Filed: October 10, 1972]

1. On June 5, 1972, Petitioner applied to the Property Assessment Division of the Department of Finance and Revenue of the District of Columbia for an exemption from payment of personal property taxes under Section 47-1208 of the District of Columbia Code which provides for the exemption of "The personal property of all library, benevolent, charitable and scientific institutions incorporated under the laws of the United States or the laws of the District of Columbia and not conducted for private gain".

2. The Petitioner, as a benevolent, charitable and scientific institution incorporated under the laws of the District of Columbia which is not conducted for private gain, qualifies for the exemption from personal property taxation.

3. The Property Assessment Division of the District of Columbia in a letter dated September 25, 1972, stated that the Washington Theater Club, Inc. did not qualify for the exemption. No reasons for denial of the exemption were given. A copy of the denial letter is attached to this petition.

4. In a telephone conversation with officials in the Property Assessment Division, Petitioner's attorney was informed that the refusal to grant the exemption was based on Petitioner's failure to prevail in a suit contesting denial of the Petitioner's real property tax exemption.

5. [Denial of] the Petitioner's request for exemption from payment of personal property taxes was an abuse of discretion.

6. The failure to give Petitioner written reasons for the denial constituted deprivation of Petitioner's property without due process of law.

7. Basing the denial of the exemption on the criteria for a denial of real property tax exemption was similarly an abuse of discretion because the standards for a personal property tax exemption are markedly different from the standards for a real property tax exemption.

APPENDIX G

RESPONDENT'S MOTION TO DISMISS THE PETITION FOR REVIEW

[Caption Omitted in Printing]

[Filed: November 17, 1972]

For the reasons set forth below, respondent moves the Court to dismiss the petition for review filed in the above-entitled cause.

The Court Lacks Jurisdiction

1. As set forth in its petition for review, the petitioner requests the Court to provide relief from a determination made by the District of Columbia Department of Finance and Revenue that the petitioner is not entitled to an exemption from payment of District of Columbia personal property taxes pursuant to D.C. Code Sec. 47-1208, 1967 ed.

In June, 1972, petitioner applied to the Department of Finance and Revenue for an exemption from payment of D.C. personal property taxes. On two prior occasions within the past five years, the petitioner similarly applied for an exemption from D.C. personal property taxes, and in both instances the requests were denied. In support of its most recent request, petitioner submitted evidence consisting of various financial documents as well as a statement describing the character of the organization. By letter dated September 25, 1972, petitioner was advised that its request for exempt status was denied. Pursuant thereto, petitioner filed a petition for review with the Court rather than seek a hearing de novo in the Superior Court of the District of Columbia, as is required by D.C. Code Sec. 47-2403, 1967 ed., Supp. V, 1972.

While the petition for review does not specify the precise nature of the relief sought, presumably the petitioner wants the Court to order the Property Assessment Division of the Department of Finance and Revenue to make a determination as to the exempt status of the petitioner in conformity with the provisions of the District of Columbia Administrative Procedures Act, D.C. Code, 1967, Sec. 1-1501, Supp. V, 1972.

2. The Court's jurisdiction to review decisions of District of Columbia agencies is governed by the D.C. Administrative Procedures Act, *supra.* Under the Act, the Court may review the decision of respondents only in a "contested case" within the meaning of Sec. 1-1502(8), which defines a contested case to mean, "a proceeding before * * * any agency in which the legal rights, duties or privileges are required by any law, or by constitutional right, to be determined after a hearing before * * * an agency but shall not include (A) any matter subject to a subsequent trial of the law and the facts de novo in any court * * *." See *Matala v. Washington,* D.C. App., 276 A.2d 127 (1971). Since the conditions required by Sec. 1-1502(8)(A) are satisfied by the terms of D.C. Code Sec. 47-2403, 1967, Supp. V, 1972, which provides for judicial review in the Superior Court, petitioner is thereby precluded from seeking immediate review by the Court.

3. Congress has specifically provided that a taxpayer aggrieved by a District of Columbia personal property tax assessment may within six months after payment of the tax appeal from the assessment to the Superior Court of the District of Columbia. Sec. 47-2403, *supra.* Decisions of the Superior Court in civil tax cases are reviewable by the District of Columbia Court of Appeals which has the power to affirm, modify, or reverse the decision of the

Superior Court with or without remanding the case for hearing. D.C. Code Sec. 47-2404(a), 1967 ed., Supp. V, 1972.

Thus, assuming *arguendo* that the complained of assessment has been paid, the petitioner must comply with the clearly enunciated statutory requirement that taxpayers seeking judicial relief of District of Columbia personal property tax assessments shall first seek review in the Superior Court of the District of Columbia.

Conclusion

Upon the foregoing, it is submitted that the petition for review of order should be dismissed.

APPENDIX H

PETITIONER'S MEMORANDUM IN OPPOSITION TO THE MOTION TO DISMISS

[Caption Omitted in Printing]

[Filed: December 8, 1972]

The government's Motion to Dismiss the Petition for Review should be denied. The argument offered in support of the Motion has no basis in the provisions of the District of Columbia Administrative Procedure Act, D.C. Code § § 1-1501 - 1-1510 (Supp. V. 1972).

Despite the fact that the Act governs the administrative procedures under which the government's Department of Finance and Revenue operates, the government is under a complete misapprehension as to the scope of that statute. The government argues that, "[u]nder the Act, the Court may review the decision of respondents *only* in a 'contested case' within the meaning of Sec. 1-1502(8). . . ." Motion to Dismiss, p. 2 (emphasis added). Nothing could be further from the truth.

Section 1-1508 of the Act provides in pertinent part as follows:

> "On petition of any interested person, . . . an agency . . . may issue a declaratory order with respect to the applicability of any rule or statute enforceable . . . by it . . . to remove uncertainty . . . . *A declaratory order is subject to review in the manner provided in this chapter for the review of orders and decisions in contested cases* . . . [E]ach agency shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition" (emphasis added).

Pursuant to regulations and forms promulgated by the Department of Finance and Revenue, petitioner, in June,

1972, petitioned the Department for a declaration of exempt status from the D.C. personal property tax under Section 47-1208 of the D.C. Code (1967 ed.). Section 47-1208 exempts from taxation, *inter alia*, "[t]he personal property of all library, benevolent, charitable, and scientific institutions incorporated under the laws of the United States or of the District of Columbia and not conducted for private gain."

By letter dated September 25, 1972, petitioner was advised that its petition for exempt status had been denied. Although there are no cases interpreting the application of Section 1-1508 to Section 47-1208, or, indeed, interpreting Section 1-1508 at all, petitioner maintains that the September 25, 1972, letter can be nothing but a declaratory order of petitioner's exempt status under Section 47-1208. As such, the order, in accordance with Section 1-1508, "is subject to review in the manner provided ... for review of orders and decision in contested cases," as that procedure for review is set forth in Section 1-1510 of the Act.* The government's Motion to Dismiss, therefore, should be denied.

Moreover, should the lack of case precedent raise questions of doubt as to the appropriate meaning and interpretation of Section 1-1508, petitioner urges that such questions should at the least not be resolved on a Motion

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*Although Section 47-2403 of the D.C. Code (Supp. V. 1972) provides for an appeal from the *assessment* of the personal property tax to the Superior Court for the District of Columbia for a *de novo* hearing, it does not provide the exclusive remedy for appealing a *denial of exemption* from the personal property tax. Unlike Section 1-1510, Section 47-2403 requires payment of the tax before the appeal may be taken. *Cf. Lindner v. District of Columbia*, 32 A.2d 540 (D.C. Mun. App. 1943).

to Dismiss. Rather, the jurisdictional issue should be postponed until argument on the merits so that the Court would have the benefit of full briefing and argument on the issue by the parties.

For the foregoing reasons, this Court should either deny the Motion to Dismiss or at least hold it in abeyance until after briefing and argument on the merits.

APPENDIX I

PETITION FOR REHEARING, OR, ALTERNATIVELY, FOR REHEARING EN BANC

[Caption Omitted in Printing]

[Filed: January 18, 1973]

For the reasons set forth below, petitioner hereby petitions this Court for a rehearing, or, alternatively, for a rehearing en banc, with respect to this Court's January 4, 1973, order granting respondent's motion to dismiss the petition for review.

Although Judges Fickling and Nebeker presented no reasons for their order dismissing the petition for review, there can be only two grounds for their action: either (1) the Judges believed that the government's denial of a personal property tax exemption was not a "declaratory order," within the meaning of Section 1-1508 of the District of Columbia Administrative Procedure Act (D.C. Code § 1-1508 (Supp. V. 1972)), and therefore not subject to review in accordance with Section 1-1510 of the Act, or (2) they believed that review was not required because, in accordance with Section 1-1502(8)(A) of the Act, the matter involved was "subject to a subsequent trial of the law and the facts de novo" in the Superior Court under the provisions of Section 47-2403 of the D.C. Code (Supp. V. 1972). Neither reason is valid.

Because of this, rehearing should be ordered for reconsideration of at least the jurisdictional question. Moreover, because there has never been a judicial decision interpreting Section 1-1508 of the Administrative Procedure Act nor of its relationship to the appellate review provisions of the Act or to other review provisions of the D.C. Code, the issues presented should not have been resolved on a motion to dismiss without at least the

opportunity provided to counsel for full briefing and oral argument. Only a rehearing could rectify the court's action.

Finally, a serious question of constitutional dimension is raised by the course of action in the present case. First, petitioner's request for exemption is denied by the administrative agency without hearing and without providing findings and reasons for the denial. In its petition, petitioner alleged that the denial violated its rights of due process and equal protection. Thereafter, two judges of this Court dismissed the petition for review without hearing and without providing findings or reasons and petitioner is effectively deprived of a right of appeal. Rehearing is therefore required to review the arbitrary actions to which petitioner has been subjected.

1. The provisions of the Administrative Procedure Act are clear that review of the denial of petitioner's personal property tax exemption is required. Section 1-1510 of that Act, provides that "[a]ny person suffering a legal wrong, or adversely affected or aggrieved, by an order or decision of . . . an agency in a contested case, is entitled to a judicial review thereof. . . ." Section 1-1508 further provides that "[a] declaratory order is subject to review in the manner provided . . . for the review of orders and decisions in contested cases. . . ." Although petitioner admits that the denial of the exemption was not an order in a contested case as that term is defined in Section 1-1502(8) of the Act, petitioner maintains that the denial of the exemption was a declaratory order, all as more fully explained in petitioner's Memorandum in Opposition to the Motion to Dismiss, and therefore subject to review. Although there are no cases interpreting Section 1-1508, the plain words of the definitional provisions of the Act bolster petitioner's position. Under the Act, a " 'license' includes the whole or part of any . . . statutory

exemption . . . granted by . . . any agency" (§ 1-1502(12)), " 'licensing' includes process respecting the grant . . . [or] denial . . . of a license by . . . an agency" (§ 1-1502(13)), and " 'order' means the whole or any part of the final disposition (whether affirmative, negative, injunctive or declaratory in form) . . . of any agency in any matter . . . including licensing" (§ 1-1502(11)). Thus, the denial of the tax exemption had to be a declaratory order subject to review, and the dismissal of the petition for review violates the express requirements of the D.C. Administrative Procedure Act. A rehearing should therefore be ordered.

2. If the two judges considered that the matter presented was "subject to a subsequent trial . . . de novo in any court" (§ 1-1502(8)) and therefore should not be reviewed, they were wrong on two scores. First "any matter subject to subsequent trial" is not a condition on the court's review power under Section 1-1510. Nor is it a limitation on the definition of declaratory order under Section 1-1508. Rather, it excludes such matter from being encompassed by the definition of a "contested case." Thus, even if the declaratory order here were subject to subsequent trial de novo in the Superior Court, it would not be excluded from review under Section 1-1510 of the Act.

Since no explicit exclusion of review is provided in the Act, review would be required. This conclusion is bolstered by the legislative history of the Act which indicates that Congress intended "to provide for *uniform* means, whereby the final determination of any agency . . . may be reviewed in court in accordance with traditional standards, as enunciated in the decisions of the Supreme Court" (emphasis added). H.R. Rep. No. 202, 90th Cong., 1st Sess. p. 3 (1967); *see* S. Rep. No. 1581, 90th Cong., 2d Sess. pp. 5, 6 (1968). In keeping

with this congressional intent, the District Court has interpreted the intent of the Act as expanding rights of review of administrative action, of centralizing such review in one place and of eliminating disorderliness and lack of uniformity of decision inherent in multiple tribunals. *See Cheek v. Washington*, 331 F. Supp. 481 (D.D.C. 1971).

Even if the limitation in Section 1-1502(8) applied to declaratory orders, it would not be a limitation on review in the present case. Respondent, in its Motion to Dismiss, alleged (p. 3) that the matter here involved was reviewable in the Superior Court of the District of Columbia under Section 47-2403 of the D.C. Code (Supp. V. 1972). But Section 47-2403 provides for an appeal from the *assessment* of the personal property tax to the Superior Court for a *de novo* hearing, contingent upon payment of tax within 90 days after assessment. This right is therefore not the same as a right to appeal *a denial of exemption* from the personal property tax. Moreover, unlike Section 1-1510, Section 47-2403 requires payment of the tax before the appeal may be taken.

The appeal, under Section 47-2403, is not an exclusive remedy, and, because of petitioner's financial position, not an adequate remedy. In *Lindner v. District of Columbia*, 32 A.2d 540 (D.C. Mun. App. 1943), it was held that, when a remedy is provided that requires payment of a tax before an appeal may be taken, that remedy is not meant to be the exclusive remedy. The court in *Lindner* reasoned that Congress did not intend the statutory appeal to be exclusive because the aggrieved party would lose all right to appeal if the party were unable to pay the tax within the alloted period after notice of assessment.

Petitioner is therefore in the financial position of possibly losing its right to appeal if it is limited to an appeal to the Superior Court which requires it to pay the property tax within ninety days after notice of assessment. This Court should therefore have asserted jurisdiction in order to preserve petitioner's rights. The inference that Congress intended to create a right protected by judicial remedies is strong where the right would be sacrificed without exercise of such jurisdiction. *See Leedom v. Kyne*, 358 U.S. 184, 190 (1958).

3. Finally, petitioner contends that a failure to review an alleged violation of constitutional rights is itself a denial of such rights. The Court may not decline to assert jurisdiction when a petitioner alleges that the administrative agency has acted arbitrarily, in excess of its authority, and has denied petitioner equal protection of the law and deprived petitioner of property without due process of law. If petitioner cannot assert this right to review before this Court, petitioner may permanently lose the right.

Petitioner, in accordance with agency rules, submitted the necessary papers and statements to the Property Assessment Division of the Department of Finance & Revenue, all of which indicated that petitioner was a benevolent, charitable and scientific institution incorporated under the laws of the District of Columbia and not conducted for private gain within the meaning of Section 47-1208 granting personal property tax exemptions. The Property Assessment Division, without hearing, issued a declaratory order stating that the organization did not qualify for the exemption, but gave no reasons for its determination.

In telephone conversations with officials in the Property Assessment Division, petitioner's attorney was informed that the refusal to grant the exemption was

based on petitioner's failure to prevail in a suit contesting denial of its real property tax exemption under Section 47-801a(j) of the D.C. Code, now on appeal before this Court. *The Washington Theater Club, Inc. v. District of Columbia*, No. 6953. The real property tax exemption is based on totally different standards from the standards for the personal property tax exemption. The denial of the real property tax was based on the finding that the petitioner was not a school within the meaning of the statute. There is no statutory requirement that petitioner be a school to qualify for the personal property tax exemption. In arbitrarily basing its denial of the personal property tax exemption on standards not applicable to the exemption, respondent abused its discretion and deprived petitioner of property without due process of law as guaranteed by the Fifth Amendment of the Constitution.

Respondent has similarly denied petitioner equal protection of the law as guaranteed by the Fifth Amendment by applying different standards to petitioner's application for tax exemption status than those applied to other organizations applying for the same status. Because petitioner's constitutional rights were violated by the denial of the exemption, petitioner should have the right of review of the agency order denying its exempt status.

For the foregoing reasons, this Court should grant a rehearing, or, alternatively, a rehearing en banc with respect to the order granting respondent's motion to dismiss the petition and either grant review of the administrative order, or, at the very minimum, order oral argument on the jurisdictional issues.